

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ERNESTO TAYPE-MIRANDA,

Plaintiff,

-against-

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REPORT AND RECOMMENDATION

10 Civ. 07770 (PAC)(KNF)

CAPTAIN CRUZ BADGE # 927, G.R.V.C. &
UNKNOWN CORR. OFFICER WHO
CONDUCTED TSO SEARCH OF PLAINTIFFS
CELL, THE CITY OF NEW YORK, AND
NEW YORK CITY DEPARTMENT OF
CORRECTIONS (NYCDOC), ET AL.,

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Defendants.

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KEVIN NATHANIEL FOX

UNITED STATES MAGISTRATE JUDGE

TO THE HONORABLE PAUL A. CROTTY, UNITED STATES DISTRICT JUDGE

Background

On or about October 8, 2010, the plaintiff pro se filed the complaint in this action. On April 18, 2011, the Court enlarged the time for the plaintiff to effect service of the summons and complaint on the defendants to May 31, 2011. On June 28, 2011, the Court enlarged the time for the plaintiff to effect service of process on the defendants to October 31, 2011. On December 1, 2011, the Court directed the plaintiff to serve the summons and complaint on the defendants by February 1, 2012.

On July 9, 2012, the plaintiff filed an amended complaint. A service package was mailed by the court to the plaintiff at the Hale Creek ASACTS correctional facility. The plaintiff did not return the service forms to the United States marshal. Although the plaintiff attached a "Certificate of Service by Mail" to his amended complaint, in which he stated that he mailed a

copy of the amended complaint to “the Office of the Comptroller, [sic] Municipal Building, Room 530, 1 Centre Street, New York, New York 10007,” no proof of service of the amended complaint on the defendants has been filed. Thereafter, the City of New York and Captain Cruz, Badge # 947, filed a motion to dismiss, contending that “[u]pon information and belief, Officer Jardine has not yet been served in this action.”

On April 11, 2013, the Court found that the plaintiff’s “Certificate of Service by Mail” is not proof of service of the amended complaint on the defendants because that type of service does not comply with Rule 4 of the Federal Rules of Civil Procedure and New York Civil Practice Law and Rules §§ 308, 311. The Court noted that it provided the plaintiff, on three previous occasions, with notice that failure to serve the defendants and to demonstrate good cause for that failure may result in dismissal of his complaint. The April 11, 2013 order directed the plaintiff to show cause, on or before April 25, 2013, why the amended complaint should not be dismissed, without prejudice, pursuant to Rule 4(m) of the Federal Rules of Civil Procedure. The plaintiff did not respond to the Court’s April 11, 2013 order.

Legal Standard

“Unless service is waived, proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the servicer’s affidavit.” Fed. R. Civ. P. 4(l)(1). “Failure to prove service does not affect the validity of service. The court may permit proof of service to be amended.” Fed. R. Civ. P. 4(l)(3). “If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against the defendant or order that service be made within a specified time.” Fed. R. Civ. P. 4(m); see Thompson v. Maldonado, 309 F.3d 107, 110 (2d Cir. 2002) (noting that court’s sua sponte dismissal, pursuant to Rule 4m,

of pro se plaintiff's complaint, without prior notice to plaintiff, was abuse of court's discretion).

Application of Legal Standard

No proof of service of the amended complaint on the defendants has been filed. Although the City of New York and Captain Cruz, Badge # 927, filed a motion to dismiss the amended complaint, it does not appear that they have been served with the amended complaint, and they contend that Correction Officer Jardine has not been served with the amended complaint. The plaintiff received multiple notices that failure to serve the defendants and to show good cause for that failure may result in dismissal of his complaint. The plaintiff failed to respond to the Court's April 11, 2013 order, directing him to show cause why this action should not be dismissed, pursuant to Rule 4(m). Accordingly, dismissal of this action for failure to effect service of the amended complaint on the defendants is warranted.

Recommendation

For the foregoing reasons, I recommend that the amended complaint in this action be dismissed, without prejudice, pursuant to Rule 4(m) of the Federal Rules of Civil Procedure.

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections, and any responses to objections, shall be filed with the Clerk of Court, with courtesy copies delivered to the chambers of the Honorable Paul A. Crotty, 500 Pearl Street, Room 735, New York, New York, 10007, and to the chambers of the undersigned, 40 Centre Street, Room 425, New York, New York, 10007. Any requests for an extension of time for filing objections must be directed to Judge Crotty. ***Failure to file objections within fourteen (14) days will result in a waiver of objections and will preclude***

appellate review. See Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466 (1985); Cephas v. Nash, 328 F.3d 98, 107 (2d Cir. 2003).

Dated: New York, New York
May 8, 2013

Respectfully submitted,



KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

Copy mailed to:

Ernesto Taype-Miranda